

Appointed Counsel is an ADA Necessity in Limited Conservatorship Appeals

Under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, once a public entity becomes aware that a recipient of its services has a disability that will significantly impair participation in the service, the entity has a duty to take steps to ensure that the participant will have: (1) effective communication during the services; and (2) meaningful participation in the services similar to those who do not have a disability.

The Court of Appeal is a public entity under the ADA. (*Tennessee v. Lane*, 541 U.S. 509 (2004)) Once it receives a notice of appeal from an order in a conservatorship proceeding, it is aware that the appellant has significant disabilities impairing cognitive functioning, understanding, communication, and decision-making. Due to the nature of the proceeding, the order being appealed creates a presumption of such a disability.

Olivia Bickley is a 19-year old adult woman who has autism. She is indigent. She was entitled to the appointment of counsel as a matter of law in the trial court proceedings under Probate Code Section 1471. She was represented by the public defender throughout those proceedings.

The conservatorship order is a major infringement on her liberty. She has lost her right to make decisions regarding her residence, education, medical treatment, and finances. Because the proceeding involves such a significant deprivation of liberty, due process rights apply. (*In re Link*, 713 S.W.2d 487 (Mo. 1986)) Under such circumstances, the appointment of counsel is a requirement of due process. (*Matter of Leon*, 43 N.Y.S.3d 769 (N.Y. Surr. Ct. 2016))

Because of her disability, Olivia is unable to represent herself on appeal. As a result, she is depending on the Court of Appeal to appoint counsel to represent her so that she will have effective communication during, and meaningful participation in, the appellate process.

More information about the right of counsel in conservatorship proceedings as a component of due process and the ADA – including the duties of courts to comply with ADA requirements – is available online. (<http://spectruminstitute.org/white-paper/>)

Speaking of Section 504, the United States Supreme Court said: “[A]n otherwise qualified handicapped

individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.” (*Alexander v. Choate*, 469 U.S. 287, 301 (1985))

Federal courts have ruled that the ADA requires public entities to provide “meaningful access” to people with disabilities so as not to deprive them of the benefits of the services provided. (*Ability Center of Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004); *Lee v. City of Los Angeles*, 350 F.3d 668, 691 (9th Cir. 2001)).

A public entity must ensure that communications with recipients of its services are as effective as communications with others. (*Robertson v. Las Animas County Sheriff's Department*, 500 F.3d 1185 (10th Cir. 2007)) To fulfill this duty, an entity may need to provide an accommodation to the recipient. The appointment of counsel in a legal proceeding has been recognized as a proper ADA accommodation. (www.spectruminstitute.org/washington-ada-rule.pdf)

“Wrongful denial of an [ADA] accommodation is structural error infecting a legal proceeding's reliability, which stands to reason because an accommodation's purpose is to help a party meaningfully participate in a way that enhances our confidence in a proceeding's outcome.” (*Biscaro v. Stern*, 181 Cal.App. 4th 702, 710 (2009))

By filing a notice of appeal, Olivia has exercised her right to appeal from the conservatorship order. That right will be meaningless unless she has an attorney to represent her during the appellate process.

Appointment of counsel will not be an undue burden on the court since appeals by limited conservatees are rare. (“Legal System Without Appeals Should Raise Eyebrows,” *Los Angeles Daily Journal*, February 10, 2015 – <http://spectruminstitute.org/no-appeals.pdf>)

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www.spectruminstitute.org/court-of-appeal.pdf